Held, that the particular surplus and undivided profits held by the bank, apportionable to the shares, could not be regarded as "income" within the sense of the law, or intent of the testator as manifested in the will. *Tubb* v. *Fowler* (1907), — Tenn. —, 99 S. W. Rep. 988.

This decision is in accordance with public policy and judicial holdings. That the share holder's interest in the surplus and profits begins only when dividends are declared, see COOK, CORP., Vol. I, § 1; CLARK & MARSHALL, PRIV. CORP., Vol. II, 517; MORAWETZ, CORP., § 344; BEACH, PRIV. CORP., Vol. II, § 602. When a corporation has a surplus or undivided profit it rests in the honest discretion of the directors, not the courts, how and when dividends shall be made. *William* v. *Western Union Telegraph Co.,* 93 N. Y. 162; *Brown* v. *Monmouthshire R. Co.,* 4 Eng. E. & Eq. 118; *Rex.* v. *Bank of England,* 2 Barn & Ald. 620; *Jackson's Admr.* v. *Newark Plank Road,* 31 N. J. L. 277, and *N. Y. etc R. Co.* v. *Nickals,* 119 U. S. 296. It would be a dangerous policy to allow one entitled to the "income" of a share to compel an apportionment of the undivided profits.

WITNESSES—PROOF OF SIGNATURE OF DECEASED BY SURVIVING PARTY IN INTEREST.—In a contest between an administrator and certain others as to the settlement of the estate of the deceased, in which the administrator sought to charge the estate with the amount of a promissory note assigned and payable to him and claimed to have been executed by the deceased, *held,* that the administrator was not a competent witness, to testify in his own behalf as to the genuineness of the signature to the note, under § 794 of the Code of Ala. 1896, which provides for disqualification of parties in interest from testifying "as to any transactions with, or statement by a deceased person whose estate is interested." *Ware* v. *Burch et al.* (1907), — Ala. —, 42 So. Rep. 562.

This decision is admittedly contrary to the weight of authority. The court in rendering it quotes from the AM. & ENG. ENCYC. OF LAW, Vol. 30, p. 1033, as laying down the rule supported by the weight of the authority; "Testimony that a document is or is not in the handwriting of the decedent involves merely a matter of opinion and not a personal transaction or communication between the witness and the decedent, if the knowledge thereof was obtained otherwise than through the transaction undergoing investigation." The conclusion is that the witness may testify as to the genuineness of the signature though he may not testify as to the actual fact of execution. *Sawyer* v. *Grandy,* 113 N. Car. 42. The authorities, in general, bear out this view, though there are decisions like the principal case to the contrary. The decisions of the different states are made under slightly varying statutes, so that they probably cannot all be cited as, either supporting or differing from the rule as stated, with equal force and decisiveness. Keeping in mind, however, the divergences of the statutes, the cases do in a general way bear towards the same point. In harmony with the rule as above stated are the following cases: *Sankey* v. *Cook,* 82 Iowa 125; *Britt* v. *Hall,* 116 Iowa 566; *Jesse* v. *Davis,* 34 Mo. App. 351; *Simmons* v. *Havens,* 101 N. Y. 427; *Peoples* v. *Maxwell,* 64 N. Car. 313; *Sawyer* v. *Grandy,* 113 N. Car. 42; *Minnis* v. *Abrams,* 105 Tenn. 662; *Martin* v. *McAdams,* 87 Tex. 225; *Daniel's Exec'r* v.

Foster, 26 Wis. 686. The opposite view has been taken in the following cases: *Merritt* v. *Straw,* 6 Ind. App. 360; *Holliday* v. *McKinne,* 22 Fla. 153; *Neely* v. *Carter,* 96 Ga. 197; *Kirksey* v. *Kirksey,* 41 Ala. 626; *In re Truitt's Estate,* 10 Phila. 16 (Penn.). The argument for this view is set forth in the case of *Neely* v. *Carter, supra,* where the court says, "To swear to the genuineness of a signature purporting to have been made by one of the deceased makers, would only be another way of proving the physical fact of execution. Such proof would be merely secondary evidence, the object of which would be to supply the place of direct evidence of actual execution, in a case where higher and more satisfactory proof of that fact was not forthcoming or available." This statutory provision, excluding the testimony of a witness to transactions had with a deceased person, is a remnant of the old rule prohibiting a party in interest from testifying in his own behalf, which is now universally abolished. The retaining of this portion of the old "interest rule" has been much criticised, and there seems to be a strong opinion that it rests upon no sound legal basis and is even positively harmful in its effect. WIGMORE, EVIDENCE, § 578, Article in 16 ALBANY LAW JOURNAL, 128; *St. John* v. *Lofland,* 5 N. D. 140. In the case last cited the argument that the provision is necessary for the protection of the estates of decedents is answered. The court says, "But those against whom a dishonest demand is made, are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible to parry if his testimony is a tissue of falsehoods,—the sword of cross-examination." For a defense of the statutory exceptions, see *Owens* v. *Owens,* 14 W. Va. 88. There is no such disqualification in England. *In re Garnett,* L. R. 31 Ch. D. 1.